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**NATIONAL MINING ASSOCIATION v. EPA: INDUSTRY  
BREATHES A SIGH OF RELIEF OVER THE  
DETERMINATION OF A SITE'S POTENTIAL  
TO EMIT POLLUTANTS UNDER  
THE CLEAN AIR ACT AMENDMENTS OF 1990**

**I. INTRODUCTION**

The Clean Air Act (CAA), considered by many to be the first modern environmental law, represented Congress's first attempt to protect this country's air from the growing pollution problems of the 1960s and early 1970s.<sup>1</sup> Under the CAA, the Environmental Protection Agency (EPA) was empowered to regulate Hazardous Air Pollutants (HAPs) by setting emission standards at levels which "provide[d] an ample margin of safety to protect public health."<sup>2</sup>

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1. See S. REP. NO. 101-228, at 1 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3385 (report of the Committee on Environment and Public Works) (citing Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671) (1990)). President Johnson first signed the Clean Air Act (CAA) into law in 1963, thereby replacing previous federal air pollution legislation. *See id.* Two years later, in hearings before the Special Subcommittee on Air and Water Pollution, the Assistant Secretary of the Department of Health, Education and Welfare stated as follows:

serious air pollution problems aris[e] from the ever-increasing use of motor vehicles, [and] our rising demands for the energy derived from burning of sulfur-bearing fuels . . . . The national importance of resolving these problems is beyond dispute. They are among the most significant factors in the growing and worsening air pollution problems currently faced by thousands of American communities . . . .

*Id.* The goal of the CAA is to "protect and enhance the quality of the Nation's air resources." *Id.* at 5.

2. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671 (1994)). Presently, there are hundreds of different Hazardous Air Pollutants (HAPs) in the air of the United States, and the quantity of each of these HAPs is no less disturbing. *See* S. REP. NO. 101-228, at 128 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3513. After major manufacturing facilities were required to report their air toxin emissions, the total for the firms reporting such emissions in 1987 exceeded 2.7 billion pounds per year, which was estimated to be as little as one-fifth of all emissions at the time. *See id.*

HAPs may cause cancer and may also be responsible for other health and environmental problems. *See id.* In a 1989 EPA study examining the potential cancer causing effects of exposure to air toxins, EPA estimated that approximately 2700 cancer cases in this country resulted from exposure to 15-40 toxic air pollutants. *See id.* According to this data, 190,000 Americans (2700 per year x 70 year life span) could potentially develop cancer from exposure to air toxins. *See id.* EPA cautioned that this may be an underestimated figure, because a much larger number of air pollutants had been identified as potentially toxic. *See id.*

The CAA worked poorly.<sup>3</sup> For example, although the Act had set 1975 as the deadline for meeting EPA's primary air quality standards,<sup>4</sup> two years after the deadline, seventy-eight areas still violated the ozone standards then in place.<sup>5</sup> In response to the failure to meet the goals of the CAA, Congress enacted the 1977 Clean Air Act Amendments (1977 Amendments) which instituted a new and more aggressive control program.<sup>6</sup> Nevertheless, "in 1989, over half of the population of the United States [was] still exposed to levels of air pollution considered unhealthy by [EPA] and medical researchers."<sup>7</sup>

The CAA also regulated criteria pollutants, so termed because under CAA sections 108 and 109, EPA must issue criteria identifying the effects of each pollutant. For example, section 108 states that:

[t]he Administrator shall issue air quality criteria for an air pollutant . . . [which] shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.

CAA § 108, 42 U.S.C. § 7408(a)(2); *see also id.* § 109, 42 U.S.C. § 7409 (providing rules for national primary and secondary ambient air standards).

3. *See* S. REP. NO. 101-228, at 128 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3513 (disclosing that in 18 years since the CAA's promulgation, EPA listed just eight pollutants as hazardous and regulated only some sources of seven of these pollutants); *see also* H.R. REP. NO. 101-490, at 322 (1990) (recognizing ineffectiveness of CAA during its 18 year existence).

4. S. REP. NO. 101-228, at 10 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3396. The CAA also required states to develop State Implementation Plans (SIPs) that would set forth programs for achieving the necessary emissions reductions. *See id.* Moreover, CAA section 111 required EPA to establish New Source Performance Standards (NSPS) for new or modified stationary sources. *See id.* As a means of enforcing the NSPS, Congress directed the states to include construction permit programs in their SIPs. *See id.*

For further discussion of SIPs, *see infra* notes 55-56 and accompanying text. For further discussion of construction permit programs, *see infra* note 56 and accompanying text.

5. *See id.* In 1977, Congress moved back the deadline for meeting the ozone and CO standards to 1982. Moreover, if sources could show that they could not meet this deadline, they could obtain an extension which would be effective until 1987. *See id.* For the definition of an "area source," *see infra* text accompanying note 38.

6. *See* S. REP. NO. 101-228, at 10-11 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3396-97. The 1977 Amendments required states to create new SIPs and to submit these plans to EPA for approval within two years. *See id.* at 10. Furthermore, the 1977 Amendments provided that "[a] new source could be constructed in a nonattainment area only if it would operate at the 'lowest achievable emissions rate' and if emissions reductions could be obtained from other sources to offset the emissions from the proposed source." *Id.* at 11. Finally, Congress created a new schedule for limiting emissions from new motor vehicles and required areas which were dangerously below EPA's prescribed emissions levels to institute emission inspection and maintenance programs. *See id.* at 10-11.

7. S. REP. NO. 101-228, at 3 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3388-89. For example, the past President of the American Public Health Association found that:

In its continued effort to create more effective air pollution legislation, Congress promulgated the Clean Air Act Amendments of 1990 (1990 Amendments).<sup>8</sup> Congress believed that one of the primary reasons for the relative failure of the CAA and the 1977 Amendments was EPA's health-based regulation of HAPs.<sup>9</sup> Consequently, the 1990 Amendments replaced this approach with a de-

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air pollution is one of the greatest risks to public health in the United States. Its [sic] causes, contributes to, or aggravates a long list of disease and dysfunction—chronic bronchitis, lung cancer, nervous disorders and heart disease. As many as 50,000 premature deaths may be caused by single air pollutants or a combination of pollutants.

*Id.* A Harvard researcher also testified that "[i]n every epidemiologic investigation that we have performed over the past 6 years, we have repeatedly found a 2 to 5 percent air pollution effect on human mortality and morbidity. We find it very difficult to reject these consistent findings . . . ." *Id.* at 2-3, 1990 U.S.C.C.A.N. at 3388. Finally, the legislative history of the 1990 Amendments noted that "[t]he American Lung Association, the American Public Health Association and the American Academy of Pediatrics all testified that we are facing a public health crisis due to air pollution." *Id.* at 2, 1990 U.S.C.C.A.N. at 3388.

There is also evidence that air pollution has a detrimental effect on the United States economy as well. According to the American Lung Association, Americans spend \$40 billion per year to treat health-related ailments attributable to air pollution exposure. *See id.* at 8, 1990 U.S.C.C.A.N. at 3394. Further, a 1989 University of California study also suggested that a reduction in air pollution in Southern California would result in almost \$10 billion in health care savings each year. *See id.*

Moreover, air pollution negatively affects the American agricultural industry. *See id.* EPA suggested that common ozone pollution levels can cause severe damage to many types of vegetation, such as reducing tomato yields by 33%, beans by 26%, and wheat by 30%. *See id.* The World Resources Institute also suggested that "if ozone levels in agricultural regions were halved, . . . U.S. wheat production would be boosted by \$650 million (in 1987 dollars), soybean production by \$3.4 billion, corn production by \$880 million, and peanut production by \$370 million." *Id.*

8. *See* Clean Air Act Amendments of 1990, PUB. L. NO. 101-549, 104 Stat. 2399, 2531-84 (1990) (codified as amended at 42 U.S.C. §§ 7401-7671 (1994)). The goal of the 1990 Amendments was "to protect, as a national resources [sic], the very air that all of us rely on for our daily existence." S. REP. NO. 101-228, at 4, 1990 U.S.C.C.A.N. at 3390. Congress stated that based on over ten years of study and consideration, the 1990 Amendments reflect "the advances in our knowledge of the health effects, sources and controls of air pollution." *Id.*

9. *See id.* at 128. Prior to the 1990 Amendments, CAA section 112 directed EPA to list those HAPs that it intended to regulate because they might "cause, or contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible, illness." Clean Air Act Amendments of 1970, PUB. L. NO. 91-604, 1990 U.S.C.C.A.N. 1954 (84 Stat.) 1676, 1685 (codified as amended at 42 U.S.C. §§ 7401-7671 (1994)). For such pollutants, EPA was to create emission standards that provided for "an ample margin of safety to protect the public health." *Id.* The legislative history of the 1990 Amendments explains that this health-based standard "[had] been interpreted by many to mean zero exposure to carcinogens, because any amount of exposure may cause a cancer. EPA [was not] willing to write standards so stringent because they would shut down major segments of American industry." S. REP. NO. 101-228, at 128 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3513.

tailed, technology-based regulatory scheme which enabled EPA to regulate the sources of HAPs themselves, rather than the pollutants they emitted.<sup>10</sup> The new scheme directed EPA to establish stringent emission standards and other requirements for sources of HAPs based on the amount of pollution each source "emits or has the potential to emit considering controls."<sup>11</sup> Unfortunately, Congress neglected to define this important phrase, leaving EPA to do so within the confines of its administrative authority.<sup>12</sup>

The result of this legislative oversight was a protracted and bitter dispute between EPA and a number of major American industries over the definition of the phrase "potential to emit," which the United States Court of Appeals for the District of Columbia finally resolved in *National Mining Association v. EPA*.<sup>13</sup> In that case, the D.C. Circuit held that EPA had impermissibly, and in excess of its authority, defined the phrase "potential to emit" as allowing only federally enforceable controls to reduce a source's potential to emit pollutants.<sup>14</sup>

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10. See S. REP. NO. 101-228, at 133 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3518.

11. CAA § 112(a)(1), 42 U.S.C. § 7412(a)(1). It is important to note that a source may be classified as a major source even if its *actual* emissions do not meet the major source thresholds. See *id.* The CAA only requires the facility to have the *potential* to emit an amount of pollution sufficient to meet the source thresholds in order to be classified as a major source classification. See *id.*

Under the 1990 Amendments, the new section 112 established an initial list of 189 HAPs which EPA could periodically revise. See *id.* § 112(b)(1)-(3), 42 U.S.C. § 7412(b)(1)-(3). Then, EPA was to publish a list of "categories and subcategories" of "major sources" and certain "area sources" that emit these pollutants. See *id.* § 112(c), 42 U.S.C. § 7412(c). For each listed "category or subcategory of major sources and area sources" of HAPs, CAA section 112(d) directs EPA to promulgate emission standards. See *id.* § 112(d)(1), 42 U.S.C. § 7412(d)(1). For further discussion of "area sources" and "major sources," see *infra* notes 36-47 and accompanying text.

12. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (stating that if statute is silent or ambiguous with respect to specific issue, court must defer to agency's construction unless such construction is based on impermissible interpretation of statute).

13. 59 F.3d 1351 (D.C. Cir. 1995). The D.C. Circuit also considered whether EPA properly required the aggregation of all hazardous air emissions within a plant site, as opposed to considering only those emissions from equipment in similar industrial categories in a major source determination under section 112. See *id.* at 1354. For a complete discussion of the aggregation issue, see *infra* notes 102-07 and accompanying text.

A third issue which the D.C. Circuit considered was whether EPA properly required the inclusion of "fugitive emissions" in a source's total emissions determination for purposes of source classification. See *National Mining*, 59 F.3d at 1354. For a complete discussion of the fugitive emissions issue, see *infra* notes 108-12 and accompanying text.

14. See *National Mining*, 59 F.3d at 1364.

This Note focuses on the scope of the CAA's restrictions on various sources of pollution. Specifically, it concentrates on the applicability of stringent CAA emission standards and other regulations which depend on the determination of a source's potential to emit pollutants under section 112 of the Act. Part II provides the background of the "potential to emit" debate through an examination of the debate's genesis, the revised section 112 under the 1990 Amendments, EPA's subsequent rulemaking, and the prior judicial treatment of the "potential to emit" issue.<sup>15</sup> Part III then presents the facts of *National Mining*.<sup>16</sup> Next, Part IV discusses the D.C. Circuit's holding and reasoning in *National Mining*.<sup>17</sup> Subsequently, Part V critically analyzes the D.C. Circuit's decision.<sup>18</sup> Finally, Part VI assesses the considerable impact that *National Mining* will have on both future court decisions and American industry.<sup>19</sup>

## II. BACKGROUND

Although the debate between EPA and affected industries over the proper way to calculate a source's potential to emit pollutants had existed for over ten years,<sup>20</sup> the conflict did not fully develop until the promulgation of both the 1990 Amendments and EPA's regulations passed pursuant to those amendments.<sup>21</sup> While the *National Mining* case presented the D.C. Circuit with an opportunity to consider the controversy surrounding a source's "potential to emit," it was not the first time this phrase had been subjected to judicial scrutiny.<sup>22</sup>

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15. For a discussion of the genesis and prior judicial treatment of the "potential to emit" debate, see *infra* notes 23-33 and accompanying text.

16. For a discussion of the facts of *National Mining*, see *infra* notes 87-97 and accompanying text.

17. For a discussion of the D.C. Circuit's holding and reasoning in *National Mining*, see *infra* notes 98-133 and accompanying text.

18. For a critical analysis of the D.C. Circuit's decision in *National Mining*, see *infra* notes 134-152 and accompanying text.

19. For a discussion of the impact of the D.C. Circuit's rejection of EPA's definition of "potential to emit" on future court decisions and American industry, see *infra* notes 153-73 and accompanying text.

20. See *National Mining Ass'n v. EPA*, 59 F.3d 1351, 1363 (D.C. Cir. 1995) (stating Congress enacted 1990 Amendments "against a backdrop of over a decade of skirmishing between [EPA] and affected companies").

21. The 1990 Amendments and EPA's subsequent regulations were at the center of the controversy in *National Mining*. See *National Mining*, 59 F.3d at 1351. For further discussion of the 1990 Amendments, see *infra* notes 33-47 and accompanying text. For further discussion of EPA's "potential to emit" rules, see *infra* notes 48-86 and accompanying text.

22. See, e.g., *Clean Air Implementation Project v. EPA*, 1996 WL 393118 (D.C. Cir. 1996) (granting motion for summary vacatur of EPA's "potential to emit" regulation); *Chemical Mfrs. Ass'n v. EPA*, 70 F.3d 637 (D.C. Cir. 1995) (vacating EPA

## A. Genesis of the "Potential to Emit" Debate

Congress first called upon EPA to promulgate regulations controlling the calculation of a source's potential to emit pollutants in the 1977 Amendments.<sup>23</sup> Believing that Congress intended a strict construction of the phrase "potential to emit," EPA narrowly interpreted this language to exclude even emissions reducing equipment such as scrubbers, filters and other technologies from the list of acceptable means of reducing a source's potential to emit pollutants.<sup>24</sup> However, in *Alabama Power Co. v. Costle*,<sup>25</sup> the D.C. Circuit rejected this strict interpretation and remanded the regulation to EPA for revision.<sup>26</sup>

In response to *Alabama Power*, in 1979, EPA proposed a new definition of "potential to emit" which would have taken into account air pollution control equipment, but not operational restraints.<sup>27</sup> EPA took a slightly broader approach in the final regulations promulgated in 1980, determining that operational restraints could be included in the emission calculations as well, but only if they were "federally enforceable."<sup>28</sup> EPA justified this new requirement as "necessary, as a practical matter, to ensure that

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regulations challenged in *National Mining*; *Alabama Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979) (rejecting early EPA interpretation of phrase "potential to emit" as excluding from calculation emissions reducing equipment such as scrubbers, filters, and other technologies); *Ogden Projects v. New Morgan Landfill*, 911 F. Supp. 863 (E.D. Pa. 1996) (reversing holding on motion for consideration in light of *National Mining* and *Chemical*).

23. The phrase, "emit, or [has] the potential to emit" originated in the Senate version of the bill that was to become the 1977 Amendments. See S. REP. NO. 94-717, at 221 (1976); S. REP. NO. 95-127, at 219 (1977). The House version used the equivalent phrase, "directly emits, or has the design capacity to emit." H.R. REP. NO. 94-1175, at 358 (1976), H.R. REP. NO. 95-194, at 438 (1977). Although the conference committee ultimately adopted the wording of the Senate bill, its report illustrates the committee's equivalent interpretation of the House and Senate versions on the "potential to emit" issue. In *Alabama Power*, the D.C. Circuit noted the committee's incorporation of the House's language in its report. See *Alabama Power*, 636 F.2d at 355 ("The State plan must require permits for: (a) All 28 categories listed in the Senate bill if the source has the potential (design capacity) to emit over 100 tons per year . . .") (citing H.R. REP. NO. 95-564, at 152 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1533)).

24. See *National Mining*, 59 F.3d at 1362; see also 40 C.F.R. §§ 51.24(b)(3), 52.21(b)(3) (1978) (excluding artificial means of emission reduction from potential to emit determination).

25. 636 F.2d 323 (D.C. Cir 1979).

26. See *id.* at 355. In *Alabama Power*, the D.C. Circuit found that EPA erred in defining "potential to emit" as excluding the beneficial effect of air pollution control equipment designed in a facility. See *id.* at 352. For further discussion of the *Alabama Power* decision, see *infra* notes 59-70 and accompanying text.

27. See 44 Fed. Reg. 51,924 (1979).

28. See 45 Fed. Reg. 52,676, 52,746 (1980). This rule was the first version to include the federal enforceability requirement. According to the regulation, emis-

sources will perform the proper operation and maintenance for the control equipment."<sup>29</sup>

The D.C. Circuit considered a subsequent challenge to the federal enforceability requirement of the 1980 rule which was ultimately settled in February 1982 after EPA agreed to amend its position.<sup>30</sup> The proposed settlement regulation would have considered emission limitations that were "enforceable under federal, state or local law and discoverable by the Administrator and any other person" in calculating a source's potential to emit pollutants.<sup>31</sup> Interestingly, in 1989, by the time EPA promulgated the final rule pursuant to the settlement agreement, it "abandon[ed] the terms of the settlement . . . [and] reverted to its former position of requiring federal enforceability as the sine qua non for crediting operational restraints."<sup>32</sup> As a result, new litigation followed in the D.C. Circuit; however, the court stayed those actions in anticipation of the 1990 Amendments.<sup>33</sup>

## B. Section 112 Under the 1990 Amendments

The 1990 Amendments fundamentally revised CAA section 112, which regulates the emission of HAPs.<sup>34</sup> Under the new scheme, Congress established a list of 189 HAPs for EPA regula-

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sion restrictions were "federally enforceable" if they were "enforceable by the Administrator." *Id.* at 52,737.

29. *Id.* at 52,688.

30. See *National Mining*, 59 F.3d at 1362. Those challenges were consolidated with related petitions as *Chemical Mfrs. Ass'n v. EPA*, Nos. 79-1112 *et al.* (D.C. Cir. 1980). Final Joint Brief of Petitioners Chemical Manufacturers Association and American Petroleum Institute, at 10 n.7, *National Mining* (No. 95-1006). The D.C. Circuit refers to this action without citation, and because the challenge eventually reached settlement it remained unreported.

31. Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 48 Fed. Reg. 38,742, 38,748, 38,755 (1983) (to be codified at 40 C.F.R. pts. 51-52).

32. *National Mining*, 59 F.3d at 1362-63. The final rule still defined "federal enforceability" as "enforceable by the Administrator," but had been expanded in scope by interpretation to include state constraints approved under federally approved plans called "State Implementation Plans." Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 54 Fed. Reg. 27,274, 27,285-86 (1989) (to be codified at 40 C.F.R. pts. 51-52). For further discussion of SIPs and their role as an emission reducing control, see *infra* note 56 and accompanying text.

33. See *National Mining*, 59 F.3d at 1363. The D.C. Circuit ultimately decided these challenges in the consolidated action, *Chemical Mfrs. Ass'n v. EPA*, Nos. 89-1514, 89-1515, 89-1516, 1995 WL 650098 (D.C. Cir. 1995). For a further discussion of the *Chemical* decision, see *infra* notes 71-74 and accompanying text.

34. S. REP. NO. 101-228, at 133 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3518; see also *National Mining*, 59 F.3d at 1353 (recognizing 1990 Amendments revised section 112 in comprehensive overhaul).



tion.<sup>35</sup> The EPA was then to publish a list of "major sources" and certain "area sources" that emitted these pollutants.<sup>36</sup> Congress defined a "major source" of hazardous pollutants as the following:

any stationary source or group of stationary sources located within a contiguous area and under common control that *emits or has the potential to emit considering controls*, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous pollutants.<sup>37</sup>

An "area source" under the CAA is "any stationary source of hazardous air pollutants that is not a major source."<sup>38</sup> Finally, for each of these major and area sources, section 112(d) directs EPA to promulgate emission standards.<sup>39</sup>

35. See CAA § 112(b)(1)-(3), 42 U.S.C. § 7412(b)(1)-(3).

36. See *id.* § 112(c)(1), 42 U.S.C. § 7412(c)(1). Section 112(c)(1) states, in pertinent part, as follows:

the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section.

*Id.* Further, "the Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section." *Id.* § 112(c)(3), 42 U.S.C. § 7412(c)(3).

37. *Id.* § 112(a)(1), 42 U.S.C. § 7412(a)(1) (emphasis added). The CAA defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." *Id.* § 111(a)(3), 42 U.S.C. § 7411(a)(3).

38. *Id.* § 112(a)(2), 42 U.S.C. § 7412(a)(2).

39. See *id.* § 112(d)(1), 42 U.S.C. § 7412(d)(1). This section specifically states that "[t]he administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section." *Id.* These emissions standards represent a significant innovation in the regulatory measures imposed upon sources of HAPs. See S. REP. NO. 101-228, at 133 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3518 (describing new technology-based standards for regulating sources of HAPs under 1990 Amendments). Under the 1990 Amendments, Congress requires major sources to attain the maximum degree of reduction in emissions that EPA deems achievable, often referred to as "maximum achievable control technology," or MACT standards. See CAA § 112(d)(2), 42 U.S.C. § 7412(d)(2). Congress directed EPA to develop such standards "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements . . . ." *Id.*

For new sources, the maximum achievable reduction in emissions must be at least as stringent as the emission control achieved in practice by the best-controlled similar source. See *id.* § 112(d)(3), 42 U.S.C. § 7412(d)(3). For existing sources in a category of 30 or more, the maximum achievable reduction in emissions must be at least as stringent as the average emission limitation achieved by the 12 best performing sources in that category. See *id.*

Because major sources are potentially subject to stricter regulatory control under the CAA than area sources, facility owners such as those represented by the petitioners in *National Mining* generally attempt to avoid a "major source" classification.<sup>40</sup> For example, "Maximum Achievable Control Technology" (MACT) emission standards are only applicable to major sources.<sup>41</sup> In addition, a major source may not be modified, constructed or reconstructed under Title V of the CAA, unless it can be shown that the source will continue to meet the MACT standards.<sup>42</sup> Further, a major source cannot obtain the requisite Title V operating permit unless it complies with extensive monitoring, reporting and record-keeping requirements.<sup>43</sup>

The CAA does not necessarily impose such stringent regulations on area sources.<sup>44</sup> Retaining the CAA's health-based standard prior to the 1990 Amendments, Congress directed EPA to list only those area sources for regulation that "present[ ] a threat of adverse effects to human health or the environment . . . ."<sup>45</sup> In addition, Congress allows EPA to choose whether to establish emission standards for listed area sources, using only "generally available control

40. See *National Mining*, 59 F.3d 1351, 1353 (D.C. Cir. 1995).

41. See CAA § 112(d)(2), 42 U.S.C. 7412(d)(2). For further discussion of MACT emission standards, see *supra* notes 41-46 and accompanying text.

42. See CAA § 112(g)(2), 42 U.S.C. § 7412(g)(2). Section 112(g)(2) provides, in pertinent part, as follows:

(A) After the effective date of a permit program under subchapter V of this chapter in any State, no person may modify a major source of hazardous air pollutants in such State, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. . . .

(B) After the effective date of a permit program under subchapter V of this chapter by any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. . . .

*Id.*

43. See *id.* §§ 501-07, 42 U.S.C. §§ 7661-61f. A Title V operating permit generally requires that "[e]ach permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." *Id.* § 504(c), 42 U.S.C. § 7661c(c). More specifically, the permit should include the following:

enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this subchapter, including the requirements of the applicable implementation plan.

*Id.* § 502, 42 U.S.C. § 7661(a).

44. See *National Mining*, 59 F.3d at 1353.

45. CAA § 112(c)(3), 42 U.S.C. § 7412(c)(3).

technologies or management practices," as opposed to the MACT standards required for major sources.<sup>46</sup> Finally, neither the Title V permitting requirements nor the restrictions on modification, construction and reconstruction are applicable to area sources.<sup>47</sup>

### C. The "Potential to Emit" Regulation

Under the 1990 Amendments, Congress directed EPA to promulgate emission standards for both major and area sources of HAPs.<sup>48</sup> In August 1993, in order to "eliminate the need to repeat general information and requirements within each [emission] standard," EPA proposed a general rule codifying the "procedures and criteria needed to implement" emission standards for sources of HAPs.<sup>49</sup> On March 16, 1994, EPA promulgated a final rule adopting these General Provisions which was the subject of the dispute in *National Mining*.<sup>50</sup>

EPA's final rule defined "major source" in terms nearly identical to those in section 112(a)(1) of the CAA.<sup>51</sup> In addition, EPA

46. See *id.* § 112(d)(5), 42 U.S.C. § 7412(d)(5) (describing alternate standards for area sources). These standards can be less stringent than the MACT standards required for major sources under section 7412(d)(2). See S. REP. NO. 101-228, at 172 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3557.

47. See *National Mining*, 59 F.3d at 1354 (citing CAA §§ 501-07, 42 U.S.C. §§ 7661-61f). For further discussion of the Title V permitting requirements see *supra* note 43 and accompanying text.

48. See CAA § 112(d)(1), 42 U.S.C. § 7412(d)(1). In relevant part, this section states that "[t]he Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation . . . ." *Id.*

49. National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 58 Fed. Reg. 42,760 (1993) (to be codified at 40 C.F.R. pts. 60, 61, and 63.). The General Provisions are essentially default provisions that are binding and attach to each source category standard. See 59 Fed. Reg. 12,408 (1994) (codified at 40 C.F.R. § 63.2). However, if so explicitly provided in the EPA regulations, any specific standard may override the General Provisions in whole or in part. See *id.*

With regard to the phrase, "potential to emit," consistent with the approach embodied in its regulations since 1980, EPA proposed to allow consideration of federally enforceable emission reducing controls, including physical and operational limits, in the calculation of "major source" thresholds. See National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 58 Fed. Reg. at 42,786.

50. See National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 59 Fed. Reg. 12,408 (1994) (codified at 40 C.F.R. § 63.2).

51. "Major source" was defined as the following:  
any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant, or 25 tons per year or more of any combination

defined a source's "potential to emit" as its "maximum capacity . . . to emit a pollutant under its physical and operational design."<sup>52</sup> Importantly, the EPA rule also allowed a source to *reduce* its potential to emit pollutants through the use of physical and/or operational controls, but only if these controls are "federally enforceable."<sup>53</sup>

Shortly after the final rule's promulgation, EPA released a memorandum to clarify what constitutes a "federally enforceable" constraint on a source's potential to emit.<sup>54</sup> In fact, EPA's primary reason for issuing this memorandum was that it recognized the complexity of the federal enforceability requirement, and the difficulty of identifying controls that meet this requirement.<sup>55</sup> The memorandum identified a number of mechanisms through which state and local agencies can create federally enforceable constraints upon a source's potential to emit.<sup>56</sup>

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of hazardous air pollutants, unless the Administrator establishes a lesser quantity . . . .

*Id.* at 12,433-34 (emphasis added). Moreover, under the rule an "area source [is] any stationary source . . . that is not a major source." *Id.* A "stationary source" is "any building, structure, facility or installation which emits or may emit any air pollutant." *Id.*

52. *Id.* at 12,434.

53. *See id.* (emphasis added). In relevant part, the rule provides that: [a]ny physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount or material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is *federally enforceable*.

*Id.* (emphasis added). A control is "federally enforceable" if it is "enforceable by the Administrator and citizens under the Act or . . . under other statutes administered by the Administrator." *Id.* at 12,433.

54. *See* JOHN S. SEITZ, DIRECTOR OF THE OFFICE OF AIR QUALITY PLANNING AND STANDARDS, TO AIR DIVISION DIRECTORS, U.S. EPA, REGIONS I-X, OPTIONS FOR LIMITING THE POTENTIAL TO EMIT (PTE) OF A STATIONARY SOURCE UNDER SECTION 112 AND TITLE V OF THE CLEAN AIR ACT (1995) [hereinafter *OPTIONS FOR LIMITING THE PTE*].

55. *See id.* at 2 (noting "there appears to be some confusion and questions regarding how potential to emit limits may be established").

According to EPA, "[f]ederal enforceability is an essential element of establishing limitations on a source's potential to emit." *Id.* at 2. This requirement assures that major sources will comply with the restrictions imposed by the CAA, because it authorizes both EPA and citizens, in addition to state and local agencies (whose programs have been approved by EPA) to enforce the restrictions/regulations applicable to the source. *See id.* In addition, EPA suggested that federal enforceability assures source owners and operators that emission limitations which they have adopted from approved state or local agencies will be recognized by EPA. *See id.*

56. *See id.* at 3. As an initial matter, EPA explained that to qualify as "federally enforceable," controls must not only be effective as a practical matter, but must also be integrated into the SIP. *See* John M. Rawicz, *Options Available to Reduce the*

*Potential to Emit of a Stationary Source Under Section 112 and Title V of the Clean Air Act*, 2 ENVTL. L. 537, 546 (1996). To be practically enforceable, a particular constraint or condition must possess adequate testing, monitoring, recordkeeping and reporting requirements. *See id.*; *see also* Memorandum from John Rasnic, Policy Determination on Limiting Potential to Emit for Koch Refining Company's Clean Fuels Project (March 13, 1992) (same).

In order for state regulations to be deemed federally enforceable, each state must create an implementation plan to enforce the substantive restrictions under the CAA and submit this plan to the Administrator of the EPA for approval. *See* CAA § 110, 42 U.S.C. § 7410 (1994). Once included within the SIP, a state control becomes enforceable not only by the state which is the primary regulating authority, but also by the EPA Administrator. *See id.* § 113, 42 U.S.C. § 7413. In addition, under certain circumstances private citizens may bring a suit for noncompliance with the now federalized pollution control programs. *See id.* § 304, 42 U.S.C. § 7604.

One method of achieving federal enforceability for state and local regulations is to attain EPA approval of a state's own operating permit program, thus creating a "federally enforceable state operating permit program," (FESOPP). *See* Options for Limiting the PTE, *supra* note 54, at 3. This case-by-case permitting program is most applicable to complex sources with numerous and varying emission points, and is often accomplished through a non-title V federally enforceable state operating permit program. *See id.*; *see also* EPA Memorandum, Approaches to Creating Federally-Enforceable Emissions Limits (November 3, 1993) (same).

Another type of case-by-case permit is a construction permit. *See* Rawicz, *supra*, at 552; *see also* Letter from John S. Seitz, Director of Office of Air Quality Planning and Standard, to Mr. Jason Grumet, Executive Director for Coordinated Air Use Management (November 2, 1994) [hereinafter Seitz Letter]. These New Source Review (NSR) construction permits generally cover new and modified sources, and are often developed by states as part of their SIPs. *See* Options for Limiting the PTE, *supra* note 54, at 4. EPA does not permit an NSR permit program to qualify as a federally enforceable control on a source's potential to emit, however, unless the program is sufficiently broad in scope. *See* Rawicz, *supra*, at 553. For example, an NSR program which defines "modification" of a source to include both physical and operational changes would qualify as a federally enforceable control. *See id.* In this way, a source which voluntarily reduces its hours of operation would constitute a "modified" facility under such an NSR program. *See id.*

A third means of attaining federal enforceability is through general restrictions on many sources within a single category, known as "prohibitory" or "exclusionary" rules, which may be included in a SIP. *See* OPTIONS FOR LIMITING THE PTE, *supra* note 54, at 4. In order to be a valid constraint on a source's potential to emit, an exclusionary rule must be practicably enforceable, adopted with adequate opportunity for public comment, and incorporated into the SIP. *See id.*; *see, e.g.*, Rawicz, *supra*, at 552.

Similar to exclusionary rules, a fourth procedure for creating federally enforceable restrictions is through general permit programs, which establish valid constraints for particular types of sources in a one time procedure. *See* Options for Limiting the PTE, *supra* note 54, at 4. The advantage of general permits over exclusionary rules is that after EPA approves a general permit program, additional sources within the same category can receive permits without requiring a formal revision of the SIP. *See* Rawicz, *supra*, at 552. Though generally considered part of a Title V permit program, state and local agencies can also submit a general permit program as part of its SIP. *See* Options for Limiting the PTE, *supra* note 54, at 4. Moreover, general permits included within a SIP-approved FESOPP can also create potential to emit limits for groups of sources. *See id.*

Finally, Title V operating permit programs may also create federally enforceable constraints on a source's potential to emit. *See id.* at 5. This type of control is rather limited, however, because the deadline for states to submit their programs

## D. Judicial Treatment of the "Potential to Emit" Regulation

Although the debate surrounding the determination of a source's potential to emit has received limited judicial attention,<sup>57</sup> the federal courts that have addressed the issue have consistently ruled in favor of broadly construing the acceptable means of reducing a source's potential to emit pollutants.<sup>58</sup> In 1979, the United States Court of Appeals for the District of Columbia first considered EPA's potential to emit regulation in *Alabama Power Co. v. Costle*.<sup>59</sup> In that case, the Alabama Power Company petitioned for review of EPA's "potential to emit" definition in the 1978 Prevention of Significant Deterioration (PSD) regulations, which allegedly ignored the effects of pollution control equipment in determining a source's potential to emit.<sup>60</sup> Holding for the power company, the court rejected EPA's strict construction of the acceptable means of

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for inclusion under Title V was November 15, 1995. See Rawicz, *supra*, at 553. Because all sources must obtain a Title V permit if their emissions exceed the major source level, Title V permits act as a federally enforceable deterrent on a source's potential to emit pollutants. See Options for Limiting the PTE, *supra* note 54, at 5; Rawicz, *supra*, at 554 (same).

57. Few courts have addressed this issue because the CAA grants exclusive jurisdiction for judicial review to the United States Court of Appeals for the District of Columbia. See CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (providing that "[a] petition for review of action of the Administrator in promulgating any . . . standard or requirement under section 7412 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia.").

58. See generally *Clean Air Implementation Project v. EPA*, No. 96-1224, 1996 WL 393118 (D.C. Cir. 1996) (granting Petitioners' motion for summary vacatur of federal enforceability requirement challenged in *National Mining*); *Chemical Mfrs. Ass'n v. EPA*, 70 F.3d 637, 1995 WL 650098 (D.C. Cir. 1995) (vacating federal enforceability requirement challenged in *National Mining*); *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (rejecting strict EPA limitations on emission reducing controls); *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863 (E.D. Pa. 1996) (calculating defendant source's potential to emit pollutants based on reasoning in *National Mining*).

59. 636 F.2d 323 (D.C. Cir. 1979). The court handed down a voluminous three-part opinion due to the number of issues raised in the case. See *id.* at 345. Judge Leventhal's opinion addresses the "potential to emit" issue. See *id.*

60. See *id.* at 353. EPA's definition of "potential to emit," excluded even emission-reducing pollution control equipment such as scrubbers, filters, and other technologies. See *id.* at 323.

The PSD regulations apply to "major emitting facilit[ies]" which are defined in CAA section 169(1) as the following:

any of the following stationary sources of air pollutants which *emit, or have the potential to emit*, one hundred [tons per year] or more of any air pollutant from the following [list of 28 source categories]. Such term also includes any other source with the potential to emit two hundred and fifty [tons per year] or more of any air pollutant . . .

CAA § 169, 42 U.S.C. § 7479(1) (emphasis added). Like section 112, section 169(1) also classified an emitting facility as a "major emitting facility" if the source emitted or had the potential to emit the threshold level of pollutants when operating at full design capacity. See *id.*

reducing a source's potential to emit.<sup>61</sup> Looking first to the language of CAA section 169, the D.C. Circuit found that because the verb "emit" referred to a source's actual emissions, EPA's interpretation of "potential to emit" caused the verb to lose all significance, because potential emissions would always exceed actual emissions.<sup>62</sup>

With respect to congressional intent, the court reasoned that when drafting the CAA, "Congress [had been] fully aware that many major new sources of air pollution were already required by law to install and operate air pollution control equipment."<sup>63</sup> Accordingly, the D.C. Circuit stated that it would require "strong statutory evidence" for EPA to establish that Congress intended to ignore the operation of control equipment required by existing law.<sup>64</sup> The D.C. Circuit found no such evidence.<sup>65</sup>

Moreover, the D.C. Circuit surmised that Congress intended to reach "large industrial enterprises—major actual emitters of air pollution" rather than small facilities that might actually or potentially emit pollutants below the threshold level.<sup>66</sup> The D.C. Circuit pointed out that if EPA were to employ its interpretation and not

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61. See *Alabama Power*, 636 F.2d at 355. The court characterized EPA's interpretation of the phrase "potential to emit" as "referring to the measure of a source's 'uncontrolled emissions' i.e., the projected emissions of a source when operating at full capacity, with the projection increased by hypothesizing the absence of air pollution control equipment designed into the source." *Id.* at 353 (emphasis added) (citing 40 C.F.R. §§ 51.24(b)(3), 52.21(b)(3) (1978)).

62. See *id.* at 353. According to the court, EPA's calculation of "potential to emit" assumed that a source operates at full capacity and without any pollution control technology. See *id.* In reality, sources do not operate under these conditions. See *id.* Thus, potential emissions will always exceed actual emissions under EPA's rule. See *id.* at 353. Consequently, EPA's interpretation failed to give effect to the disjunctive "or" in the definition of "potential to emit." See *id.*

63. *Id.* at 353. The sources of these requirements were the "new source performance standards" of CAA section 111, as well as provisions of existing state implementation plans. See *id.*

64. See *id.* at 353-54.

65. See *id.* at 354 (stating "[a]ll the statutory evidence points the other way"); see also Rawicz, *supra* note 56, at 540 (reporting "[t]he court found no statutory authority that required EPA to calculate the 'potential to emit' without considering the air pollution control equipment that the CAA required to be designed into the facility.").

66. See *Alabama Power*, 636 F.2d at 354. The court based this finding on the 100 ton per year threshold of section 169(1), which extends coverage to 28 categories of facilities. See *id.* The D.C. Circuit also found that the legislative history of the CAA demonstrated Congress's understanding that some industrial sources would be too small to satisfy the major source tonnage thresholds set forth in section 169(1). See *id.*; see, e.g., H.R. REP. NO. 95-564, at 152 (1977), U.S.C.C.A.N., 1077, 1533; S. REP. NO. 95-127, at 96-97; S. REP. NO. 94-717, at 23; 123 CONG. REC. S9255 (daily ed. June 9, 1977) (remarks of Sen. Domenici); 123 CONG. REC. S9169 (daily ed. June 8, 1977) (remarks of Sen. Muskie); 123 CONG. REC. S12809 (daily ed. July 29, 1976) (remarks of Sen. McClure).

consider the effects of air pollution control equipment, every facility in the listed categories would have the potential to emit above the threshold level.<sup>67</sup> Finally, the D.C. Circuit reasoned that Congress, aware of the high rate of effectiveness of pollution control equipment,<sup>68</sup> must have intended for such control measures to be included in the "potential to emit" calculation so as to avoid the classification of obviously minor sources as major sources of hazardous pollutants.<sup>69</sup> Therefore, after considering both the relevant statutory language and legislative history, the D.C. Circuit rejected EPA's 1978 regulation defining "potential to emit" as excluding pollution control equipment from a source's emission determination.<sup>70</sup>

Less than two months after the court handed down the *National Mining* decision, the D.C. Circuit again considered a challenge to EPA's definition of the phrase "potential to emit" in *Chemical Manufacturers Ass'n v. EPA*.<sup>71</sup> In this consolidated action, the petitioners challenged EPA's "potential to emit" definition as set forth in regulations involving its New Source Review (NSR) program.<sup>72</sup> Like the Final General Provisions rule challenged in *National Mining*, the NSR imposed a federal enforceability prerequisite on the controls that may be considered in reducing a source's po-

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67. See *Alabama Power*, 636 F.2d at 354.

68. See *id.* The court noted that at the time of the enactment of the PSD provisions, technology was available that could reduce the particulate matter from emissions by over 99%. See *id.* Thus, a major source under EPA's regulations with the potential to emit 100 tons per year of particulate matter would actually emit less than one ton per year using such emission control technology. See *id.*

69. See *id.* The D.C. Circuit pointed out that the heating apparatus used in a large high school or in a small community college would become a "major" source under EPA's strict interpretation of the statute. See *id.* (citing CONG. REC. 512,812 (daily ed. July 19, 1976)).

70. See *id.* at 355. In so doing, the court also rejected EPA's argument that a contrary interpretation of "potential to emit" creates a conflict between sections 169(1) and 165(b) of the CAA. See *id.* Rather, the court stated that the asserted conflict was based on an erroneous interpretation of the application of CAA section 165(b). See *id.* at 354. In addition, while the court conceded that the legislative history provides some support for EPA's position, the committee reports and floor debates reflect a congressional intent inconsistent with EPA's "uncontrolled emissions" approach. See *id.* at 355.

71. 1995 WL 650098 (D.C. Cir. 1995). The disposition of this case remains unpublished pursuant to D.C. Circuit Rule 36(b). See *id.* at \*1. The decision of the D.C. Circuit is referenced in a "Table of Decisions Without Reported Opinions" which appears in the Federal Reporter at 70 F.3d 637. See *id.*

72. See Final Joint Brief of Petitioners Chemical Manufacturers Ass'n and American Petroleum Institute at 1; *Chemical Mfrs. Ass'n v. EPA*, 1995 WL 650098 (D.C. Cir. 1995) (No. 89-1514).



tential to emit pollutants under the CAA.<sup>73</sup> In a one-page opinion, the D.C. Circuit stated that it had decided a similar challenge in *National Mining*, vacated the regulations, and remanded the case "to [EPA] for reconsideration in light of *National Mining Association*."<sup>74</sup>

Shortly after the *Chemical* decision, the United States District Court for the Eastern District of Pennsylvania became the first federal district court to follow the reasoning of the D.C. Circuit in *Ogden Projects, Inc. v. New Morgan Landfill Co.*<sup>75</sup> The plaintiff sought (1) a declaratory judgment against the defendant; (2) an order enjoining further operation of the landfill until the defendant obtained the proper CAA permit; and (3) damages and costs as a result of the defendant's violations.<sup>76</sup> The district court held that

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73. See Final Joint Brief at \*1, *Chemical* (No. 89-1514). See also 40 C.F.R. § 52.24(h)(12) (1996). According to section 52.24 of the C.F.R.:

*Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 C.F.R. parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 C.F.R. 52.21 or under regulations approved pursuant to 40 C.F.R. part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

40 C.F.R. § 52.24(h)(12). For further discussion of EPA's regulation setting out its definition of "potential to emit," see *supra* notes 48-72, 74-86 and accompanying text.

74. *Chemical*, 1995 WL 650098, at \*1. Interestingly, nine months later, Chemical Manufacturers Association was again a party to a separate challenge to EPA's regulations defining "potential to emit" as including a federal enforceability prerequisite. See *Clean Air Implementation Project v. EPA*, No. 96-1224, 1996 WL 393118, \*1 (D.C. Cir. 1996) (granting Petitioners' motion for summary vacatur and remand in light of both *National Mining* and *Chemical*) (Rogers, J., concurring in part, dissenting in part).

75. 911 F. Supp. 863 (E.D. Pa. 1996). Proceeding under CAA section 304, the citizen suit provision of the CAA, the plaintiff, a competing resource recovery facility, alleged that the defendant constructed and continued to operate a solid waste landfill without the permit required by Part D of Title I of the CAA. See *Ogden*, 911 F. Supp. at 866. Section 304 states, in pertinent part, as follows:

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

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(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

*Id.* § 7604(a)(3), CAA § 304 (1994).

76. See *Ogden*, 911 F. Supp. at 866.

the defendant's landfill did not violate the preconstruction permit requirement for major sources under Part D of the CAA,<sup>77</sup> because its potential to emit pollutants did not meet the major source thresholds when calculated using non-federally enforceable controls.<sup>78</sup>

77. *See id.* at 874. Part D of Title I of the CAA requires a preconstruction review and permit for all proposed stationary sources in certain areas that qualify as "major sources" of pollutants. *See id.* at 874 (citing 42 U.S.C. § 7511a(f) (1994); 40 C.F.R. § 165(a)(1)(iv)(B) (1994)).

The EPA has set forth a number of preconstruction permitting requirements in order to satisfy Part D. *See id.* (citing 40 C.F.R. § 51.165 (1994), 40 C.F.R. § 52.24 (1994), and 40 C.F.R. pt. 51, Appendix S (1994)). These requirements include that major source applicants:

- (a) obtain sufficient "offsetting emissions reductions" from existing air pollution sources in the proposed projects geographical area;
- (b) demonstrate that the offsetting emissions reductions procured ensure that the nonattainment area make progress toward complying with the applicable NAAQS and provide a net air quality benefit to the area; and
- (c) install air pollution control equipment to comply with the Lowest Achievable Emission Rate Standard.

*Ogden*, 911 F. Supp. at 874-75 n.17 (quoting CAA § 173(a)(1)(A), 42 U.S.C. § 7503(a)(1)(A); 40 C.F.R. §§ 51.165(a)(2), (a)(3)(ii)(F) (1994)). For purposes of Part D, section 7511c(b)(2) defines a "major source" as "any stationary source that emits or has the potential to emit at least 50 tons per year of volatile organic compounds," or VOCs. *See id.* at 875 n.18 (quoting CAA § 184(b)(2), 42 U.S.C. § 7511c(b)(2)). In relevant part, CAA section 184(b)(2) states:

[a]ny stationary source that emits or has the potential to emit at least 50 tons per year of volatile organic compounds shall be considered a major stationary source and be subject to the requirements which would be applicable to major stationary sources if the area were classified as a Moderate nonattainment area [among which is the requirement to obtain a Part D permit per CAA §§ 181(a)(2)(C)(I) and 182(b)].

CAA § 184(b)(2), 42 U.S.C. § 7511c(b)(2). Further, for Part D permitting purposes, EPA defined "potential to emit" as including a federal enforceability prerequisite on its emissions limitations. *See Ogden*, 911 F. Supp. at 872 (citing 40 C.F.R. § 51.165(a)(1)(iii) (1994)). In relevant part, EPA defined "potential to emit" to mean:

the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is *federally enforceable*.

*Id.* (emphasis added). *See also* 40 C.F.R. § 51.165(a)(1)(iii) (1994).

78. *See Ogden*, 911 F. Supp. at 876. The district court's decision was made after the defendant made a motion for reconsideration of the case in light of the D.C. Circuit's holding in *Chemical*. *See id.* at 865. The district court explained that its prior decision finding the defendant landfill violated the CAA was based largely on EPA's definition of the term "potential to emit," which the D.C. Circuit had vacated just six days prior to its own ruling. *See id.* at 872. Thus, the court stated that "[a]fter assessing [*Chemical*'s] impact, we now find Defendant not in violation of the Clean Air Act," because the defendant's gas management system acceptably reduced the landfill's potential to emit pollutants below the major source thresholds. *See id.* at 865.

First, the district court found that the necessary data existed at the time of the site's construction<sup>79</sup> to determine that the gas management system would effectively reduce the landfill's emissions below the major source threshold.<sup>80</sup> Coupling the site's 99% destruction efficiency with a 100% gas collection rate, the district court determined that the landfill would produce non-fugitive emissions of at most 6.7 tons per year—a figure well below the 50 tons per year threshold.<sup>81</sup> Therefore, the district court held that the defendant's gas management system was an effective form of pollution control equipment.<sup>82</sup>

Next, the district court ruled that the defendant's gas management system also satisfied the requirement set forth in *National Mining* that the emission controls stem from local, state or federal government regulations, because the defendant had in fact received a construction and operation permit from the Pennsylvania Department of Environmental Protection.<sup>83</sup> Accordingly, the court found that this permit "constitute[d] a regulation required by state law that force[d] Defendant to limit its . . . emissions to below 50 tons per year."<sup>84</sup> The district court thus concluded that the defendant did not violate the permit requirement under Part D of the CAA, because its landfill's potential to emit, when calculated using state controls, did not rise to the level of a major source.<sup>85</sup> There-

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79. *See id.* at 876 (concluding that defendant met standard set forth in *National Mining*). The plaintiff disputed this finding, arguing unsuccessfully that under an *ex ante* evaluation of the gas management system, there was no basis from which to conclude that this control system would be "unquestionably" and "demonstrably" effective in limiting emissions to below 50 tons per year. *See id.*

80. *See id.* at 877. The court determined that both parties had apparently assumed that the landfill had the ability to capture 100% of the gas it generated in calculating its non-fugitive emissions. *See id.* In addition, the court noted that in its Solid Waste Permit Application, the defendant "guaranteed" that the gas management system would on average destroy over 99% of the fugitive emissions collected. *See id.*

81. *See id.* at 876. In a separate part of the opinion, the court ruled that only non-fugitive emissions may be counted in determining whether a source meets the 50 tons per year threshold, because EPA had not satisfied the rulemaking requirement under CAA section 302(j). *See id.* at 878.

82. *See id.* at 877.

83. *See Ogden*, 911 F. Supp. at 877. Among this permit's conditions was a requirement that an applicant demonstrate that its site's emissions would fall below the major source threshold, a fact which the defendant sufficiently proved. *See id.* This permit incorporated the standards set forth in the CAA as part of Pennsylvania's SIP. *See id.* For a further discussion of SIPs, see *supra* notes 62-71 and accompanying text.

84. *Ogden*, 911 F. Supp. at 878.

85. *See id.* at 876. In so holding, the district court also rejected the defendant's argument that the *Chemical* decision actually created two separate standards for evaluating a source's potential to emit pollutants, because *National Mining* only

fore, the federal courts that have considered challenges to EPA's definition of "potential to emit" are in accordance with *National Mining* in broadly construing the acceptable controls for determining a source's potential to emit pollutants.<sup>86</sup>

### III. FACTS

*National Mining* presented the D.C. Circuit with an opportunity to again consider the debate surrounding the calculation of a source's potential to emit pollutants.<sup>87</sup> General Electric Company and four trade associations,<sup>88</sup> representing various American industries, filed a petition for review of an EPA order implementing the 1990 Amendments to CAA section 112.<sup>89</sup> Petitioners challenged three aspects of the EPA order.<sup>90</sup>

First, National Mining Association (NMA), American Forest and Paper Association (AFPA) and General Electric disputed EPA's requirement to aggregate all hazardous air emissions within a plant site to determine whether that site is a major source under section 112.<sup>91</sup> Next, NMA challenged EPA's requirement of the inclusion

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addressed operational restrictions on a source's potential to emit, while *Alabama Power* would govern physical restrictions. *See id.* at 875. The court rejected this position, stating that *National Mining* made clear that "the court was dealing with both types of pollution controls." *See id.* Moreover, in *National Mining*, "the court focused on an EPA definition identical to the one at issue in the instant case." *Id.* In addition, the district court maintained that if the D.C. Circuit intended to limit its decision only to operational restriction, "it would have said so explicitly." *Id.* at 875-76.

86. For a discussion of federal courts that have broadly construed the acceptable controls for determining a source's potential to emit pollutants, see *supra* notes 57-86 and accompanying text.

87. *See also National Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995).

88. The four petitioning trade associations were (1) Chemical Manufacturers Association (CMA), representing companies that manufacture industrial chemicals; (2) American Petroleum Institute (API), representing companies engaged in the petroleum industry; (3) National Mining Association (NMA), representing companies that produce metal, coal and minerals, and that manufacture mining equipment; and (4) American Forest and Paper Association (AFPA), representing companies that make pulp, paper, paperboard and solid wood. *See id.* at 1352.

89. *See id.* The D.C. Circuit Court of Appeals had original jurisdiction over this action pursuant to CAA section 307(b), which states that "[a] petition for review of action of the Administrator in promulgating . . . any emission standard or requirement under section 7412 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia." CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (1994).

90. National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 59 Fed. Reg. 12,408 (1994) (to be codified at 40 C.F.R. pts. 60, 61, and 63).

91. *National Mining*, 59 F.3d at 1354-55. The court referred collectively to NMA and AFPA as NMA for purposes of this issue. *See id.* at 1354. General Electric argued that EPA may require aggregation of emissions from sources only if those

of "fugitive emissions" in a source's aggregate emissions in a major source determination.<sup>92</sup> Finally, and most importantly, Chemical Manufacturers Association (CMA) and American Petroleum Institute (API) contended that EPA overstepped its regulatory authority by permitting a source to reduce its "potential to emit" only with "federally enforceable" emission controls, thereby unreasonably excluding equally effective state and local means of emission reduction.<sup>93</sup>

The United States Court of Appeals for the District of Columbia first held that EPA reasonably interpreted the CAA as requiring the aggregation of all hazardous air emissions within a plant site in determining whether a site was a major source.<sup>94</sup> Next, the D.C. Circuit found that EPA also reasonably required the inclusion of fugitive emissions in a site's hazardous air emissions for purposes of determining whether that site was a major source.<sup>95</sup> Finally, the D.C. Circuit held that EPA had in fact exceeded its authority by considering only federally enforceable emission controls in determining a plant site's potential to emit pollutants.<sup>96</sup> Therefore, the

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sources fell within the same source category. *See id.* at 1355. NMA claimed that EPA may combine emissions only if the emitting facilities fall within the same two-digit Standard Industrial Classification (SIC) Code. *See id.* SIC codes refer to "the nomenclature used to categorizes industries." *Id.* at 1355 n.6. Facilities may be categorized into major groups (2-digit SIC Code), industry groups (3-digit SIC Code), or industry codes (4-digit SIC Code), depending on the level of detail which is determined to be appropriate. *Id.* (citing EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 12 (1987)).

92. *See National Mining*, 59 F.3d at 1359. EPA's final rule defined "fugitive emissions" as "those emissions from a stationary source that could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening." National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 59 Fed. Reg. at 12,433. NMA contended that EPA could not include fugitive emissions of hazardous air pollutants in a major source determination without first conducting a separate rulemaking pursuant to section 302(j). *See National Mining*, 59 F.3d at 1359.

93. *See id.* at 1354. The court referred collectively to CMA and API as CMA for purposes of this issue. *See id.* Clearly, a primary reason for the petitioners' desire for state and local controls to be included in EPA's "potential to emit" determination was to allow sources to more easily avoid the stricter permit and regulatory requirements that accompany a major source classification. *See id.* at 1353 (stating that "[u]nder the Act, 'major sources' of hazardous air pollutants are potentially subject to stricter regulatory control than are 'area sources'"). For a discussion of the more stringent regulations for major sources as compared to area sources under the CAA, see *supra* notes 40-47 and accompanying text.

94. *See National Mining*, 59 F.3d at 1361 (holding "all emissions are to be counted in determining whether a source is major").

95. *See id.* (stating EPA "may require the inclusion of fugitive emissions in a site's aggregate emissions").

96. *See id.* at 1363. The D.C. Circuit reasoned that EPA had failed to explain how its refusal to consider limitations other than those that are federally enforcea-

D.C. Circuit granted CMA's petition for review of EPA's regulation requiring that limitations on a site's potential to emit be federally enforceable.<sup>97</sup>

#### IV. NARRATIVE ANALYSIS

In *National Mining*, the United States Court of Appeals for the District of Columbia considered three claims set forth by the petition for review of EPA's regulations implementing the 1990 Amendments.<sup>98</sup> While the D.C. Circuit denied review of EPA's rules requiring the aggregation of a source's HAPs<sup>99</sup> and the inclusion of fugitive emissions in a major source determination,<sup>100</sup> the court granted review of EPA's definition of "potential to emit."<sup>101</sup>

##### A. Aggregation

The D.C. Circuit first considered whether EPA had improperly required the aggregation of emissions from all facilities on a contiguous plant site under common control in a major source determination.<sup>102</sup> Looking to the statutory language at issue, the D.C. Circuit found that "EPA's reading of the provision is not [only] consistent with the provision; it is nearly compelled by the statutory

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ble comported with the statute's directive to "consider controls" when such refusal resulted in the exclusion of state or local controls that were unquestionably effective. *See id.*

97. *See id.* at 1365. The D.C. Circuit's reasoning in *National Mining* ultimately formed the basis for the court's decision, two months later, to vacate EPA's definition of "potential to emit" in *Chemical*. For further discussion of the *Chemical* decision, see *supra* notes 71-74 and accompanying text.

98. *See National Mining*, 59 F.3d at 1354. General Electric and NMA asserted the "aggregation" issue, NMA asserted the "fugitive emissions" issue, and CMA and API asserted the "potential to emit" issue. *See id.*

99. For a discussion of the "aggregation" issue, see *infra* notes 102-07 and accompanying text.

100. For a discussion of the "fugitive emissions issue," see *infra* notes 108-12 and accompanying text.

101. *See National Mining*, 59 F.3d at 1365. For a discussion of the "potential to emit" issue, see *infra* notes 113-33 and accompanying text.

102. *See id.* at 1354. General Electric argued that EPA may only aggregate emissions from different facilities on a contiguous plant site under common control when the facilities belong to the same source category. *See id.* at 1355. Section 112 defines a "category" of sources as "a group of sources having some common features suggesting that they should be regulated in the same way and on the same schedule." *Id.* at 1355 n.5 (quoting Initial List of Categories of Sources under Section 112(c)(1) of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 31,576, 31,578 (1992)). For example, sources considered to be in the same category include "hazardous waste incineration" and "sewage sludge incineration." *See id.* (citing Initial List of Categories of Sources under Section 112(c)(1) of the Clean Air Act Amendments of 1990, 57 Fed. Reg. at 31,591).

language."<sup>103</sup> Additionally, the D.C. Circuit similarly rejected General Electric's "anomalous results" argument.<sup>104</sup> Rather, the D.C. Circuit found that General Electric's argument reflected a misreading of section 112, and stated that "[i]f a small emissions unit is a 'major source' because it is located at a plant that [exceeds the major source thresholds], it is subject to all the regulatory requirements imposed on major sources, including those of section 112(d) and section 112(g)."<sup>105</sup>

The court also declared that NMA's Standard Industrial Classification (SIC) argument against the aggregation of emissions at contiguous facilities under common control "warrant[ed] little discussion."<sup>106</sup> Rejecting NMA's position, the D.C. Circuit found to be reasonable EPA's explanation that it defined "major source" without reference to (1) SIC codes in section 112; (2) the seven different objectives of that section; and (3) other provisions of the CAA which also included references to the term "major source."<sup>107</sup>

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103. *Id.* at 1356. The D.C. Circuit reasoned that section 112(a)(1) requires only three conditions for a stationary source to be considered a "major source": sources within the group must be "located within a contiguous area"; (2) they must be "under common control"; and (3) in the aggregate, they must emit or, considering controls, have the potential to emit 10 or more tons per year of a single hazardous air pollutant or 25 or more tons per year of any combination of hazardous air pollutants.

*Id.* (quoting in part CAA § 112(a)(1), 42 U.S.C. § 7412(a)(1)) (1994)). The court pointed out that this provision "says nothing about combining emissions only from sources within the same source categories . . . ." *Id.* at 1356.

104. *See id.* at 1356-57. General Electric suggested that under CAA section 112(g), "an operator of a small emissions unit at a large facility might have to install MACT in order to modify or reconstruct the unit, even though the unit would not be subject to a MACT standard under § 112(d), [42 U.S.C. § 7412(g)]." *Id.* at 1357.

105. *Id.* at 1357. The D.C. Circuit also dismissed General Electric's argument that EPA's implementation of CAA section 112(a)(1) was procedurally flawed. *See id.* Indeed, the court found that "[e]ven if General Electric were correct about EPA's alleged procedural defects, the company has not shown why these supposed mistakes were so serious that, had they not been made, there is a 'substantial likelihood that the rule would have been significantly changed.'" *Id.* at 1358 (quoting CAA § 107(d)(8), 42 U.S.C. § 7412(d)(8)).

106. *National Mining*, 59 F.3d at 1358. NMA claimed that because EPA used a SIC approach to define "major source" for ozone nonattainment areas and the Title V permitting program, EPA should also use the same method for section 112. *See id.*; *see also* CAA § 182(c)-(e), 42 U.S.C. § 7511a(c)-(e) (relating to major sources in ozone nonattainment areas); CAA § 501(2), 42 U.S.C. § 7661(2) (relating to major sources in Title V permit program).

107. *See National Mining*, 59 F.3d at 1358; *see also Alabama Power Co. v. Costle*, 636 F.2d 323, 397-98 (D.C. Cir. 1980) ("EPA has latitude to adopt definitions of . . . 'source' that are different . . . from those [used in other programs]."); *cf. Mobil Oil Corp. v. EPA*, 871 F.2d 149, 153 (D.C. Cir. 1989) ("This court has previously upheld the agency's decision to employ different definitions of the term 'facility' in construing different portions of RCRA.").

Thus, the D.C. Circuit concluded that EPA properly required the aggregation of all emissions within a contiguous plant site under common control in a "major source" determination under section 112.

## B. Fugitive Emissions

In *National Mining*, the D.C. Circuit also considered whether EPA had properly included fugitive emissions in a major source determination without first conducting a separate rulemaking.<sup>108</sup> According to NMA, *Alabama Power* required the Administrator under CAA section 302(j) to promulgate a separate regulation in order to include fugitive emissions in determining whether a source is a "major source."<sup>109</sup> The D.C. Circuit distinguished *Alabama Power* from the present case, however, due to several differences between section 302(j) and section 112(a)(1).<sup>110</sup> In addition, the court

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The court also disposed of NMA's argument that EPA's definition of "major source" is inconsistent with the legislative history of the 1990 amendments. See *National Mining*, 59 F.3d at 1358-59. NMA based this position on an excerpt from the House Report discussing the "major source" definitional language added to CAA section 182(a):

The definition of "major source" [in the ozone nonattainment area] and elsewhere in the bill uses the term "group of sources located within a contiguous area and under common control." The Committee understands this to mean a group of sources with a common industrial grouping, i.e., the same two-digit SIC code.

*Id.* at 1359 (quoting H.R. REP. NO. 101-490, at 236-37 (1990)). The D.C. Circuit found that as a general matter, however, the legislative history supports EPA's interpretation. See *id.*

108. See *National Mining*, 59 F.3d at 1359. EPA defined "fugitive emissions" in its final rule as "those emissions from a stationary source that could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening." *Id.* at 1359 (citing National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 59 Fed. Reg. 12,408, 12,433 (1994) (to be codified at 40 C.F.R. § 63.2)). The court stated that "[i]n contrast to fugitive emissions, emissions emanating from a stack, chimney or vent are often called 'point source' emissions." *Id.* at 1359 n.16 (citing *Alabama Power*, 636 F.2d at 368).

109. *Id.* at 1360. In relevant part, CAA section 302(j) provides that: [e]xcept as otherwise expressly provided, a "major stationary source" or "major emitting facility" is any stationary source of air pollutants that "directly emits, or has the potential to emit" at least 100 tons per year of any air pollutant, including "any major . . . source of fugitive emissions . . . as determined by rule by the Administrator."

*Id.* (quoting CAA § 302(j), 42 U.S.C. § 7602(j)) (emphasis added).

In *Alabama Power*, the court held that EPA had improperly included fugitive emissions within section 169(1) of its "significant deterioration in air quality program" without first conducting rulemaking procedures as required by CAA section 302(j). See *Alabama Power*, 636 F.2d at 368-70.

110. See *National Mining*, 59 F.3d at 1360-61. The D.C. Circuit first concluded that "one cannot say that section 302(j) supplies 'quantitative terms' for section 112(a)(1)'s definition of 'major source,' as it did for section 169(1), one of the provisions at issue in *Alabama Power*." *Id.* at 1361. Second, the court stated that



found that the legislative history of the 1990 Amendments further illustrated the differences between the two provisions.<sup>111</sup> Therefore, the D.C. Circuit held that EPA permissibly included fugitive emissions in major source determinations without first making a separate rule to that effect.<sup>112</sup>

### C. Potential to Emit

Finally, the D.C. Circuit began its consideration of EPA's definition of "potential to emit" by pointing out that the phrase had been at the center of more than a "decade of skirmishing between [EPA] and affected companies."<sup>113</sup> Employing the test for statutory interpretation established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,<sup>114</sup> the D.C. Circuit then considered EPA's argument that because Congress had not expressly defined the term "controls" under CAA section 112, EPA was free to interpret the term as

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unlike section 302(j), which distinguishes between "direct" air pollutants and fugitive emissions, section 112(a)(1) does not consider fugitive emissions as a separate category of emissions. *See id.* Finally, Title V of the CAA draws an express distinction between the two sections when it defines "major source" for permitting purposes as "either a 'major source as defined in section 7412 [§ 112]' or a 'major stationary source as defined in section 7602 [§ 302].'" *Id.* (quoting CAA § 501(2), 42 U.S.C. § 7661(2)) (emphasis added).

111. *See id.* at 1361. The D.C. Circuit looked to the Senate committee report, stating that the definition of "major source" in section 112 "will only apply in the context of this section and should not be confused with other meanings of the term 'major source' . . . ." *Id.* at 1361 (citing S. REP. NO. 101-228, at 150-51 (1990), reprinted in 1990 U.S.C.C.A.N. 3385, 3535-36).

112. *See id.* at 1361. *But cf. Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863, 877 (E.D. Pa. 1996) (holding that fugitive emissions may not be counted to determine whether landfills are major sources for Part D permitting purposes).

113. *National Mining*, 59 F.3d at 1363. For a further discussion of the protracted history of litigation between EPA and affected industries over the definition of the phrase "potential to emit," see *supra* notes 23-33 and accompanying text.

114. *See National Mining*, 59 F.3d at 1362. In *Chevron*, the United States Supreme Court established a two-part test for evaluating a governmental agency's interpretation of a statute. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see also Ohio v. Department of the Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989) (stating "[i]f the court, having studied the statutory text, structure and history, is left with the unmistakable conclusion that Congress had an intention on the precise question at issue, 'that intention is the law and must be given effect.'" (quoting *Chevron*, 467 U.S. at 843 n.9).

The first part of the *Chevron* test requires the court to determine whether Congress has spoken to the question at issue. *See id.* at 842. The Supreme Court explained that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Under the second part of *Chevron*, if the court finds that the statute is silent or ambiguous on the specific issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

including only those emission-reducing controls that were "federally enforceable."<sup>115</sup>

Applying the first step of the *Chevron* test, the D.C. Circuit looked to the statutory language directing EPA to "consider controls" in determining a source's potential to emit pollutants and concluded that Congress "conspicuously did not limit controls to those that are federally enforceable."<sup>116</sup> The D.C. Circuit also established that regardless of the statute's ambiguity with respect to the term "controls," Congress intended EPA to consider only those controls that are "effective."<sup>117</sup>

Under the second part of the *Chevron* test, the D.C. Circuit then considered the legislative history of the 1990 Amendments to determine whether EPA had permissibly refused to consider state and local controls on grounds other than their lack of effectiveness.<sup>118</sup> EPA argued that the rejection of an earlier version of the 1990 Amendments containing a broad version of the term "controls" illustrated Congress's support for EPA's restrictive definition of emission controls.<sup>119</sup> However, the D.C. Circuit dismissed this argument, stating that Congress's disapproval of the Senate bill in favor of a more restrictive version did "not necessarily suggest that it implicitly delegated to EPA authority to limit the class of . . . restraints . . . to those that are 'federally enforceable.'"<sup>120</sup>

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115. See *National Mining*, 59 F.3d at 1362.

116. *Id.* at 1363. The court noted that the potential for broad interpretations of the term, such as one allowing the term "controls" to refer to non-governmental operational restrictions that a source might voluntarily adopt, supports the conclusion that the term is not clear on its face. See *id.* at 1362.

117. See *id.* (stating EPA would clearly be justified in excluding those controls that are "only chimeras and do not really restrain an operator from emitting pollution."). The EPA attempted to justify its position by identifying several state and local regulatory approaches that may qualify as effective "federally enforceable" controls under its rule. See *id.* at 1363. For a full discussion of these regulatory approaches, see *supra* note 56 and accompanying text.

A few examples of these "federally enforceable" controls are as follows: (1) inclusion of the state or local regulation within a SIP; (2) source-specific exclusionary rules; and (3) permit requirements available within a FESOPP. See Memorandum from EPA on Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act, at 2-4 (Jan. 25, 1995). The D.C. Circuit noted, however, that each of the regulatory methods which EPA identified required inclusion within a SIP, a decision over which EPA had exclusive control. See *National Mining*, 59 F.3d at 1363. Thus, the court found that "EPA has proposed conditions for achieving 'federal enforceability' that go beyond the mere effectiveness of [a] particular constraint as a practical matter." *Id.*

118. See *National Mining*, 59 F.3d at 1364.

119. See *id.* (citing S. 1630, 101st Cong. (1989) (describing controls as "installed and operating")).

120. *Id.*

The D.C. Circuit similarly rejected EPA's contention that Congress had implicitly ratified EPA's past treatment of non-federally enforceable controls when it enacted the 1990 Amendments.<sup>121</sup> In evaluating this argument, the D.C. Circuit acknowledged that the 1989 EPA regulations requiring federal enforceability had been the subject of a legal challenge when Congress promulgated the 1990 Amendments.<sup>122</sup> Therefore, in light of this challenge to federal enforceability, the D.C. Circuit found that "Congress cannot be said to have ratified EPA's position [in the 1990 Amendments] by introducing the phrase 'considering controls' without an explicit 'federal enforceability' limitation."<sup>123</sup>

The D.C. Circuit also found unpersuasive EPA's policy arguments supporting the federal enforceability requirement on potential to emit reductions.<sup>124</sup> EPA asserted that in the absence of the federal enforceability requirement, it would be subject to the administrative burden of evaluating the effectiveness of all applicable state and local controls in reducing a source's potential to emit pollutants.<sup>125</sup> While recognizing the legitimacy of administrative concerns,<sup>126</sup> the D.C. Circuit nevertheless opined that EPA's "strained interpretation of the statute [was] based on what appear[ed] to be only its unwillingness to evaluate any state or local controls that [were] not federalized."<sup>127</sup> Thus, the D.C. Circuit rejected EPA's first policy argument.

The D.C. Circuit also disposed of EPA's second policy argument in support of its federal enforceability requirement.<sup>128</sup> EPA argued that limiting the means of reducing a source's potential to emit pollutants to federally enforceable controls furthered one of Congress's primary goals in amending the CAA in 1990, namely, to create a "national uniformity" among the states with respect to air pollution regulations.<sup>129</sup> The D.C. Circuit concluded that this goal

121. *See id.* at 1364.

122. *See id.* For a discussion of the proposed 1989 EPA regulations requiring federal enforceability, see *supra* notes 53-56 and accompanying text.

123. *National Mining*, 59 F.3d at 1364.

124. *See id.*

125. *See id.*

126. *See id.* The court stated that "[a]dministrative problems . . . can under certain circumstances inform an agency's construction of imprecise statutory language." *Id.* (citing *Drummond Coal Co. v. Hodel*, 796 F.2d 503, 507 (D.C. Cir. 1986)).

127. *Id.* at 1364.

128. *See National Mining*, 59 F.3d at 1365.

129. *See id.* at 1364-65. (citing H.R. REP. NO. 101-490, at 232 (1990) (finding "[t]he states' approaches to regulation varied widely . . . creating 'a patchwork of differing standards'")).

could be achieved without accepting EPA's restrictive interpretation of congressional intent.<sup>130</sup> Rather, the D.C. Circuit reasoned that the 1990 Amendments already effectively created a national standard by requiring the classification of major and area sources which are subject to federal statutory compliance regulations.<sup>131</sup> The D.C. Circuit further concluded that the legislature's desire for national uniformity among state air pollution regulations "[b]y no means suggest[ed] that Congress necessarily intended for state emissions controls to be disregarded in determining whether a source is classified as 'major' or 'area' under that national standard."<sup>132</sup> Granting CMA's petition for review of the EPA order, the D.C. Circuit found that EPA exceeded its authority by only considering federally enforceable emission controls in determining a source's potential to emit pollutants.<sup>133</sup>

## V. CRITICAL ANALYSIS

While the conclusions of the United States Court of Appeals for the District of Columbia were well-reasoned, the court's analysis would have benefitted from additional support. The legislative history of the 1990 Amendments further supports the D.C. Circuit's rejection of General Electric's "source category" challenge to EPA's aggregation requirement.<sup>134</sup> CAA section 307(d)(7)(B) provides an alternative basis for supporting EPA's inclusion of fugitive emissions in a major source determination.<sup>135</sup> Finally, both prior judicial treatment of the term "potential to emit" and the rules of statutory construction support the D.C. Circuit's inclusion of state and local controls in determining a source's potential to emit pollutants.<sup>136</sup>

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130. See *id.* at 1365.

131. See *id.*; see also CAA § 112(c)-(d), 42 U.S.C. § 7412(c)-(d) (1990) (providing requirements for listings of source categories and for emission standards pertaining to each category or subcategory of major sources and area sources). For a further discussion of major sources, area sources, and their corresponding compliance measures, see *supra* notes 39-47 and accompanying text.

132. *National Mining*, 59 F.3d at 1365.

133. See *id.* The D.C. Circuit subsequently denied EPA's motion for rehearing en banc on the "potential to emit" issue on September 21, 1995. See *id.* at 1351; Rawicz, *supra* note 56, at 558-59.

134. For a critical analysis of the "aggregation" issue, see *infra* notes 137-38 and accompanying text.

135. For a critical analysis of the "fugitive emissions" issue, see *infra* notes 139-41 and accompanying text.

136. For a critical analysis of the "potential to emit" issue, see *infra* notes 142-52 and accompanying text.

## A. Aggregation

Although the D.C. Circuit properly rejected General Electric's "source category" challenge to the aggregation requirement based on the statutory language of section 112, the legislative history of the 1990 Amendments also supports this conclusion.<sup>137</sup> Senator Durenberger, one of the managers of the 1990 Amendments, confirmed that EPA's aggregation approach comported with Congress's intent by stating that "if the total emissions from the *entire site combined* meet or exceed the [major source thresholds] then the *entire site* is a major source and subject to regulation."<sup>138</sup> Thus, the legislative history of the 1990 Amendments also supports the D.C. Circuit's conclusion that EPA permissibly required the aggregation of all emissions at a contiguous site under common control.

## B. Fugitive Emissions

While the D.C. Circuit's reasoning on this issue is also persuasive, there is an alternative ground for disposing of NMA's claim which the court appears to have overlooked. The CAA requires parties to submit comments during the proposed rule's designated comment period so that EPA may address these concerns in its final rule.<sup>139</sup> The CAA further provides that "[o]nly an objection to a

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137. For example, the House Report states:

[f]or purposes of the definition [of "major source"], all emissions of listed pollutants are counted from a group of sources within a plant boundary (contiguous property under common ownership). This is to assure that emissions from the facility as a whole are adequately controlled.

H.R. REP. NO. 101-490, at 324 (1990). Both the Senate and House Reports also support EPA's view that MACT standards can be applied individually to contiguous sources within a major source. See S. REP. NO. 101-228, at 168 (1990), *reprinted in* 1990 U.S.C.A.N. 3385, 3553 (citing example of facility with HAP emissions from "stack and non-point sources" and specifying that "MACT will be determined for each type of emissions point and not for the facility as a whole"); see also H.R. REP. NO. 101-490, at 329 ("The MACT provision in the bill gives the Administrator discretion in categorizing and subcategorizing facilities for regulation under subsection (d).").

138. 136 CONG. REC. S16,920 (daily ed. Oct. 27, 1990), *reprinted in* 1 CRS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 731, 865 (statement of Sen. Durenberger) (emphasis added). Senator Durenberger also confirmed that MACT standards should apply to all sources of hazardous air pollutants within a major source, regardless of whether each source alone would be "major." See *id.* Finally, Senator Durenberger noted that the "opposite interpretation," which would exempt from MACT requirements those facilities at a "major" plant site that are not themselves "major," "is contrary to our intent and not a permissible interpretation." *Id.* at 865.

139. See CAA § 307, 42 U.S.C. § 7607(d)(6)(A) (1994) (providing that final rule shall be accompanied by statement explaining reasons for changes in final rule from proposed rule); see also *id.* § 307, 42 U.S.C. § 7607(d)(6)(B) (providing

rule or procedure which was raised with reasonable specificity *during the period for public comment* . . . may be raised during judicial review.”<sup>140</sup> However, no party submitted comments on the proposed fugitive emissions rule with respect to section 302(j), which NMA questioned in *National Mining*.<sup>141</sup> Therefore, the D.C. Circuit could have dismissed NMA’s challenge on this issue based on NMA’s failure to raise any objections to the proposed fugitive emissions rule during the comment period.

### C. Potential to Emit

The D.C. Circuit properly interpreted the phrase “potential to emit” to include not only federally enforceable controls, but also those that are enforceable under state and local law.<sup>142</sup> The federal courts which have addressed the phrase have consistently ruled in favor of broadly construing the acceptable means of reducing a source’s “potential to emit” pollutants.<sup>143</sup> For example, in *Alabama Power*, the D.C. Circuit itself first considered EPA’s “potential to emit” regulation shortly after its promulgation.<sup>144</sup> There, the D.C. Circuit rejected EPA’s strict definition of the phrase, which at that

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that final rule shall be accompanied by statement responding to comments “submitted in written or oral form *during the comment period*.”) (emphasis added).

140. CAA § 307, 42 U.S.C. § 7607(d)(7)(B) (emphasis added). See also *Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 427-28 (D.C. Cir. 1986) (dismissing petitions for review for failure to comment); *Specialty Equip. Mkt. Ass’n v. Ruckelshaus*, 720 F.2d 124, 141 (D.C. Cir. 1983) (same).

141. See Brief for Respondent at 60, *National Mining Ass’n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (No. 95-1006).

142. See *National Mining Ass’n v. EPA*, 59 F.3d 1351, 1351 (D.C. Cir. 1995). In its rule implementing the amendments, however, EPA defined these emission-reducing controls as including only those that were “federally enforceable.” *National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions*, 59 Fed. Reg. 12,408, 12,434 (1994). For a full discussion of section 112 under the 1990 Amendments, see *supra* notes 33-46 and accompanying text. For a full discussion of the “federal enforceability” requirement, see *supra* notes 54-56.

143. See *Clean Air Implementation Project v. EPA*, No. 96-1224, 1996 WL 393118 (D.C. Cir. June 28, 1996) (granting Petitioners’ motion for summary vacatur of federal enforceability requirement challenged in *National Mining*); *Chemical Mfrs. Ass’n v. EPA*, Nos. 89-1514 to 89-1516, 1995 WL 650098 (D.C. Cir. Sept. 15, 1995) (vacating federal enforceability requirement challenged in *National Mining*); *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (rejecting strict EPA limitations on emission reducing controls); *Ogden Projects, Inc. v. New Morgan Landfill*, 911 F. Supp. 863 (E.D. Pa. 1996) (calculating defendant source’s potential to emit pollutants based on reasoning in *National Mining*).

144. See *Alabama Power*, 636 F.2d at 323. For a full discussion of the *Alabama Power* decision, see *supra* notes 59-70 and accompanying text.

time excluded pollution control equipment such as scrubbers and filters from a source's emission determination.<sup>145</sup>

In addition, the decision of the United States District Court for the Eastern District of Pennsylvania in *Ogden* provides strong support for the D.C. Circuit's reasoning. In *Ogden*, after initially finding that the defendant's operation of a landfill constituted a violation of the CAA's major source permit requirement, the district court reversed its earlier decision based on the D.C. Circuit's use of state and local emission controls in *National Mining* to determine a source's "potential to emit."<sup>146</sup> Subsequent to the *Ogden* decision, the D.C. Circuit has remained consistent in holding that state and local emission controls should be included in a source's "potential to emit" determination.<sup>147</sup>

The rules of statutory construction as outlined in the United States Supreme Court's *Chevron* decision also support the D.C. Circuit's interpretation of the phrase "potential to emit" as including state and local controls.<sup>148</sup> Looking to the express language of the statute as directed by the first part of the *Chevron* test, Congress stated that a "major source" is "any stationary source . . . that *emits or has the potential to emit considering controls*, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants."<sup>149</sup> Therefore, because the express language is not clear regarding the type of controls acceptable under the CAA, the second part of the *Chevron* test dictates that the D.C. Circuit's analysis move beyond the language of the statute to determine whether EPA's construction is reasonable.<sup>150</sup>

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145. See *Alabama Power*, 636 F.2d at 355. According to the court, EPA's definition of "potential to emit" comported with neither the language of the statute nor the intent and purpose of Congress in promulgating the legislation. See *id.*

146. See *Ogden*, 911 F. Supp. at 863. For a full discussion of the *Ogden* decision, see *supra* notes 75-85 and accompanying text.

147. See *generally Chemical*, 1995 WL 650098 (D.C. Cir. 1995) (Nos. 89-1514 to 89-1516) (vacating EPA's "potential to emit definition" based on *National Mining* decision); *Clean Air Implementation Project*, 1996 WL 393118, at \* (granting Petitioners' motion for summary vacatur of federal enforceability requirement challenged in *National Mining*).

148. For a discussion of the *Chevron* rules of statutory interpretation, see *supra* note 114.

149. CAA § 112(a)(1), 42 U.S.C. § 7412(a)(1) (1994) (emphasis added).

150. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (stating that if statute is silent or ambiguous on specific issue, question for court is whether agency's answer is based on permissible construction of statute). It should be noted, however, that within the major source definition, Congress includes no language of limitation pertaining to the term "controls." See *id.*

Furthermore, the legislative history of the 1990 Amendments supports the D.C. Circuit's broad interpretation of the types of "controls" acceptable under the Act. The Senate report states that "[t]he determination as to whether a source is a major source . . . is based on the emissions of hazardous air pollutants from the source *after application of installed controls and reflecting the actual operating conditions of the particular source.*"<sup>151</sup> Thus, the Senate report suggests that emission determinations should include not only those controls which have been effectively implemented, but also a flexible evaluation of the operating conditions of a particular source. Further, the House report similarly provides that "[t]he determination as to whether a source is a 'major source' [should be] based on the emissions of hazardous air pollutants from the source *after application of installed controls.*"<sup>152</sup> Thus, the House report also illustrates Congress's intent to allow a broader range of controls than EPA's definition of the phrase would have permitted. Therefore, both precedent and the legislative history of the 1990 Amendments support the D.C. Circuit's broader interpretation of the phrase "potential to emit" as including federal, state and local controls.

## VI. IMPACT

The decision of the United States Court of Appeals for the District of Columbia in *National Mining* will have a substantial impact on both future court decisions and American industry.<sup>153</sup> In addition to creating precedent which is binding on virtually every federal court,<sup>154</sup> the D.C. Circuit also established a means for sources of pollution to avoid the CAA's extensive and complex regulatory requirements which accompany a major source classification.<sup>155</sup> Most importantly, the D.C. Circuit's holding provides a much

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151. S. REP. NO. 101-228, at 151, 1990 U.S.C.C.A.N. at 3536 (emphasis added).

152. H.R. REP. NO. 101-490, at 325 (emphasis added).

153. While the D.C. Circuit did not actually vacate EPA's "potential to emit" regulation until two months later in *Chemical*, the court relied entirely on its reasoning in *National Mining* to justify the decision to vacate EPA's rulemaking. *Chemical*, Nos. 89-1514 to 1516, 1995 WL 650098 (D.C. Cir. Sept. 15, 1995) (unpublished disposition). For a further discussion of *National Mining's* impact on the *Chemical* case, see *supra* note 74 and accompanying text.

154. *National Mining* will be binding on virtually every federal court, because CAA section 307(b)(1) grants exclusive jurisdiction to the United States Court of Appeals for the District of Columbia. See CAA § 307(b)(1), 42 U.S.C. § 7607(b). For a further discussion of the CAA's exclusivity provision, see *infra* note 156 and accompanying text.

155. For a discussion of the means by which sources of pollution may avoid major source classification, see *infra* notes 165-70 and accompanying text.



needed resolution to the "potential to emit" debate and creates a degree of predictability for industry implementation of pollution control mechanisms.

The decision in *National Mining* to allow consideration of state and local emission-reducing controls in determining a source's potential to emit will serve as binding precedent within the D.C. Circuit's jurisdiction. Moreover, with the exception of the United States Supreme Court, the D.C. Circuit's ruling will also have a binding effect on every other federal court, because the CAA extends exclusive jurisdiction for challenges of EPA's regulatory authority under section 112 to the United States Court of Appeals for the District of Columbia.<sup>156</sup> Thus, absent a grant of certiorari by the United States Supreme Court, any judicial modification of EPA's now vacated "potential to emit" regulation will necessarily have to come from the D.C. Circuit.

Perhaps the best evidence of *National Mining*'s impact on future court decisions is found in *Ogden*.<sup>157</sup> In that case, after originally finding that the defendant's landfill violated the CAA's emission standards, the United States District Court for the Eastern District of Pennsylvania actually reversed itself on a motion for reconsideration in light of *National Mining* and *Chemical*.<sup>158</sup> Based on these decisions, the *Ogden* court held on reconsideration that the defendant's landfill did not violate the CAA, because its potential to emit, when calculated including state and local controls, did not rise to the level of a major source.<sup>159</sup>

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156. See CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (providing that "[a] petition for review of action of the Administrator in promulgating . . . any emission standard or requirement under section 7412 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia.").

157. See *Ogden*, 911 F. Supp. 863, 863 (E.D. Pa. 1996). For a full discussion of the *Ogden* decision, see *supra* notes 75-85 and accompanying text.

158. See *Ogden*, 911 F. Supp. at 865. The court explained that it was unaware of the D.C. Circuit's decision to vacate EPA's "potential to emit" definition when it handed down its first ruling. See *id.*

159. See *id.* In addition to the support that *National Mining* has begun to receive from the federal courts, a number of state and local air pollution control agencies have also endorsed the decision. See *Air Pollution: State, Local Regulatory Agencies Urge EPA Not to Appeal Federal Enforceability Case*, DAILY ENV'T REP., (BNA), Nov. 2, 1995, at A13 [hereinafter *Air Pollution*]. For example, the presidents of both the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) urged EPA not to appeal the *National Mining* decision after the D.C. Circuit denied EPA's petition for review. See *id.* Rather, STAPPA and ALAPCO "asked EPA to work with them 'to implement the court order in a manner that [could] address [their] collective concerns . . .'" *Id.*

Interestingly, the specter of "federal enforceability" may still loom at the state level. As part of its criteria for SIP approval, EPA required that each state include a "federal enforceability" prerequisite for all regulations included in its implementation plan.<sup>160</sup> As the D.C. Circuit explained, "[o]nce included within the SIP, a state control becomes enforceable not only by the state which is its primary regulating authority, but also by the Administrator . . . and, in certain settings, by private citizens, who can bring suit for noncompliance with federal pollution control programs under § 304 . . . ."<sup>161</sup>

In the wake of *National Mining*, however, these state-imposed federal enforceability requirements may be subject to similar judicial challenges. Though not binding on state courts in evaluating their own legislation, the D.C. Circuit's vacatur of EPA's federal enforceability requirement will certainly carry great persuasive value. If "EPA [could] not explain[ ] why it is essential that a [federally enforceable] control be included within a SIP," then it is unlikely that EPA will be successful in doing so on the state level.<sup>162</sup> Moreover, the fact that few states actually have programs which EPA has approved for consideration in a potential to emit determination also reduces the likelihood of a lingering federal enforceability requirement.<sup>163</sup>

The *National Mining* decision will have a substantial impact on American industry as well.<sup>164</sup> The D.C. Circuit's decision to allow

160. See Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 54 Fed. Reg. 27,274, 27,281-82 (1989) (to be codified at 40 C.F.R. pts. 51, 52); see also *National Mining Ass'n v. EPA*, 59 F.3d 1351, 1363 (D.C. Cir. 1995) (recognizing "federal enforceability" as requirement for SIP approval).

161. *National Mining*, 59 F.3d at 1363. For a further discussion of the Administrator's power to bring suit, see *supra* note 53 and accompanying text. For a further discussion of the citizen suit provision under the CAA, see *supra* note 56 and accompanying text.

162. *National Mining*, 59 F.3d at 1364.

163. See Final Joint Brief of Petitioners Chemical Manufacturers Association and American Petroleum Institute at 13, *National Mining* (No. 95-1006) (stating "EPA pointed out that some 'sources that would qualify as area sources exempt from the HON [the MACT standard for the chemical industry] . . . do not have the ability to demonstrate to EPA that their potential to emit is below major source levels.'" (quoting National Emission Standards for Hazardous Air Pollutants for Source Categories; Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry and Other Processes Subject to the Negotiated Regulation for Equipment Leaks, 59 Fed. Reg. 53,359 (1994) (to be codified at 40 C.F.R. pt. 63))).

164. In fact, the prominence and diversity of the petitioners themselves indicates to some extent the importance of *National Mining* to American industry. For a description of the petitioners in *National Mining*, see *supra* note 88 and accompanying text.

effective state and local emission controls in a "potential to emit" determination will have the greatest impact on those facilities currently classified as "major sources." Because a major source classification depends on the amount of pollution a source "emits or has the potential to emit," sources previously classified as major sources may now take advantage of state and local controls to reduce their "potential to emit" below the major source thresholds.<sup>165</sup>

The consequences of such a reduction are considerable. A major source that can effectively reduce its "potential to emit" below the major source thresholds may then avoid the extensive and complex regulatory requirements that would otherwise apply to that source.<sup>166</sup> Such a facility would then have to comply only with the CAA's area source regulations, which are exceedingly less stringent than their major source counterparts.<sup>167</sup>

*National Mining* will also affect new major sources constructed after the D.C. Circuit's decision.<sup>168</sup> New major sources may now avoid the strict Title V major source construction permits that the CAA required.<sup>169</sup> In addition, the CAA emission standards for new major sources will no longer affect those sources now able to achieve a "potential to emit" below major source levels using state and local emission controls.<sup>170</sup> Thus, the *National Mining* decision represents a major victory for American industry because it essentially relieves those sources that successfully reduce their potential

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165. For a discussion of the CAA's definition of a "major source," see text accompanying note 37 and accompanying text.

166. See, e.g., *Ogden*, 911 F. Supp. 863, 863 (E.D. Pa. 1996) (allowing defendant to reduce potential to emit through state control to avoid liability under CAA for failure to obtain major source permit). A major source that has successfully reduced its "potential to emit" using state and local controls would traditionally avoid the major source regulations by petitioning for review of its classification by the administrator. See CAA § 307(b), 42 U.S.C. § 7607(b) (1994) (providing for judicial review of action by Administrator). Alternatively, such a source may simply choose to not comply with the "inapplicable" major source regulations, and challenge its classification in the event that EPA files suit. A source must do so carefully, however, because the CAA provides for severe penalties for non-compliance. See CAA § 502(c)(5)(E), 42 U.S.C. § 7661a(c)(5)(E) (providing for penalty of not less than \$10,000 per day for each violation of Title V permit requirement).

167. For a discussion of the strict major source regulations as compared to the less stringent area source regulations under the CAA, see *supra* notes 40-47 and accompanying text.

168. The CAA defines new sources as any "stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source." CAA § 112(a)(4), 42 U.S.C. § 7412(a)(4).

169. For a discussion of the permit application requirements under the CAA, see *supra* note 43 and accompanying text.

170. For a discussion of the strict emission standards for new major sources, see *supra* notes 40-43 and accompanying text.

to emit using state and local controls of the financial and administrative burdens associated with major source compliance.

While it will have a significant impact on future court decisions and American industry, the D.C. Circuit's decision does not create any additional risk to public health. *National Mining* relieves certain sources of pollution from the CAA's strict compliance standards without sacrificing Congress's goal of preserving the nation's clean air.<sup>171</sup> The decision does not alter the major source emission thresholds themselves, however, but rather broadens the category of controls which may be considered in reducing a source's potential to emit with respect to those thresholds.<sup>172</sup> The effect of *National Mining* is to allow a source to avoid these controls if it has incorporated effective federal, state or local controls which keep the source from emitting, actually or potentially, an amount of pollutants which exceeds the major source thresholds. Truly, as the D.C. Circuit recognized in *National Mining*, "the environment shouldn't care whether [federal, state or local controls are] responsible for reducing the emissions" which threaten to destroy it.<sup>173</sup>

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171. See *National Mining*, 59 F.3d 1351, 1351 (D.C. Cir. 1995); see also S. REP. NO. 101-228, at 5 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3391 (stating that "[t]he goal of the Clean Air Act is to protect and enhance the quality of the Nation's air resources").

172. For example, after *National Mining*, a source which emits or has the potential to emit 30 tons per year of a particular HAP (thereby exceeding the major source thresholds) will still be subject to the CAA's major source compliance regulations. See generally CAA § 112(a)(1), 42 U.S.C. § 7412(a)(1) (identifying major source thresholds as "ten tons per year or more of any hazardous pollutant or 25 tons per year of any combination of hazardous pollutants.").

173. *Air Pollution*, *supra* note 159, at A14.

